Office Supreme Court, U.S.
FILED
OCT 28 1962

IN THE

Supreme Court of the United States

October Term, 1962

No. —— 70

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS

v.

NATIONAL LABOR RELATIONS BOARD

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC. and ROCKVILLE SCOWS, INC.

v.

NATIONAL LABOR RELATIONS BOARD

NATIONAL LABOR RELATIONS BOARD

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION AFL-CIO

PETITION OF DECK SCOW CAPTAINS LOCAL 335, INDEPENDENT, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF CASE	3
I. Board's Finding of Fact	3
A. Bargaining History	3
B. The Deck Scow Local Votes to Disaffiliate from the U.M.D.-N.M.U. and the Association Withdraws Recognition	5
1. Following an attempt to merge it with the tugboat local, the deck scow local votes to consider disaffiliation from the U.M.D.	5
2. The U.M.D. purports to impose a trusteeship on the deck scow local	5
3. The deck scow local disaffiliates from the U.M.D. and the Association withdraws recognition	6
4. The deck scow local affiliates with S.I.U.	8

PAGE

C. Association member discharges two employees and deck scow captains strike; following the strike the S.I.U. withdraws its charter 9

D. Local 335, U.M.D., threatens further discharges and causes the discharge of employee Elgahim 10

II. The Board's Conclusions and Order 12

III. Court's Decisions 13

ARGUMENT

I. The Court of Appeals drew inferences and conclusions from the facts contrary to the reasonable inferences and conclusions drawn by the Board 14

II. The Trustee was appointed in violation of Section 302 of the Labor Management Reporting and Disclosure Act, and therefore since he was the only indicia of the existence of the organization which he headed, said organization cannot be considered a labor organization within the provisions of the National Labor Relations Act 16

CONCLUSION 20

APPENDIX A 21

APPENDIX B 25

Table of Citations

	PAGE
Cases:	
National Labor Relations Board v. F. W. Woolworth Co., 352 U. S. 938, 77 S. Ct. 261 (1956) ...	16
National Labor Relations Board v. Southern Bell T. & T. Co., 319 U. S. 50, 60, 63 S. Ct. 905 (1943)	16
Radio Officers Union, etc. v. N. L. R. B., 347 U. S. 17, 74 S. Ct. 323 (1954)	16
Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 71 S. Ct., 456 (1951)	15
Statutes:	
Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 531, 29 U. S. C. 462 .....2, 16, 19	
Section 302 .....16, 17, 18, 19	
National Labor Relations Act as amended, 61 Stat. 136, 72 Stat. 945, 29 U. S. C. 151, *et seq.* 2, 17, 19	
Section 8(a)(1)	3, 12
Section 8(a)(2)	3, 12
Section 8(a)(3)	3, 12
Section 8(a)(5)	3, 12
Section 8(b)(1)(A)	3, 12
Section 8(b)(2)	3, 12

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PETITION OF DECK SCOW CAPTAINS LOCAL 335, INDEPENDENT, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Deck Scow Captains Local 335, Independent, petitions for a writ of certiorari to review the judgments of the Court of Appeals for the Second Circuit, entered on September 20, 1962, and October 1, 1962, denying petition for rehearing en

banc of judgment of Court of Appeals for the Second Circuit entered on July 31, 1962, denying enforcement and setting aside an order and decision of the National Labor Relations Board.

Opinions Below

Neither the judgment of the Court of Appeals on the petition for rehearing (Appendix B, pp. 40-41) is reported. The opinion of the Court of Appeals denying enforcement and setting aside the Order and Decision of the Board (Appendix B, pp. 25-39) is reported at 306 F. 2d 89 (1962). The Board's Decision and Order together with the Trial Examiner's Consolidated Intermediate Report (Rec. Vol. III, pp. 5a-77a) are reported at 136 N. L. R. B. No. 79.

Jurisdiction

The last judgment of the Court of Appeals for the Second Circuit was entered on October 1, 1962 (Appendix B, p. 41). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U. S. C. 151 *et seq.*) and the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 531, 29 U. S. C. 462) are set forth in Appendix A, pp 21-24.

Questions Presented

1. Whether the Court of Appeals may refuse to enforce an order of the National Labor Relations Board by drawing

inferences from and arriving at conclusions of facts contrary to the reasonable inferences drawn and conclusions made by the Board from the same facts?

2. Whether a person appointed as a trustee, without authority and in violation of Sec. 302 of the Labor Management Reporting and Disclosure Act, be considered a labor organization within the provision of the National Labor Relation Act?

STATEMENT OF CASE

I. The Board's Finding of Fact

Briefly, the Board found that by withdrawing recognition from the union which represented its employees and by recognizing respondent Union, the Harbor Carriers of the Port of New York and its members, hereafter called the Association, violated Section 8(a)(2), (5) and (1) of the Act. The Board further found that two Association members violated Section 8(a)(3) and (1) by discharging employees for refusing to join respondent Union, and that respondent Union violated Section 8(b)(1)(A) and (2) by threatening to cause the discharge of one employee and by causing the discharge of another for refusing to join it. The violations found by the Board stem from the disaffiliation of a deck scow local, Local 335, from the United Marine Division of the National Maritime Union on May 29, 1961, followed by the Association's withdrawal of recognition from Local 335, which after that date became an independent union, and its recognition of respondent Union, Local 335, U.M.D. The substantially undisputed facts on which the Board's decision is based are summarized below.

A. Bargaining History.

The Association consists of employers who own or operate scows, barges and tugs in the New York area. Those

employers who transport freight for hire comprise the Harbor Carriers Division of the Association; those which transport their own materials—largely sand or gravel—comprise the Industrial Division.

The employers in each division employ deck scow captains, nonsupervisory employees who tend the scows-landing lines, pumping seepage, and otherwise looking out for the general welfare of the scow. The scows are not self-propelled and must be towed from place to place by tugs. The deck scow captains in the New York area have had a local union of between 700 and 1000 members since about 1934. For many years the deck scow local has had bargaining contracts with the Association, the most recent having been executed in 1959 to expire March 31, 1961.

During its history the deck scow local had a variety of affiliations. In 1954 the deck scow local, the tugboat local, and several other marine locals were sublocals of Local 933, International Longshoremen's Association. In that year the sublocals disaffiliated with the I.L.A. and affiliated with District 50, United Mine Workers. Sometime later, the deck scow local, apparently along with the other marine locals, disaffiliated from the U.M.W. and obtained a federal charter from the American Federation of Labor. In 1956, a new entity, the "United Marine Division" with its "subordinate locals," affiliated with the National Maritime Union, as "an autonomous division with autonomous locals." Under this arrangement, the deck scow local became Local 335, U.M.D.-N.M.U., and the tugboat local became Local 333, [redacted].-N.M.U. The president and the secretary-treasurer of the tugboat local, the largest of the group, held the same offices in the U.M.D. Throughout the various changes in affiliation, the Association continued to recognize the deck scow local, however affiliated, as the bargaining agent for the deck scow captains.

B. The deck scow local votes to disaffiliate from the U.M.D.-N.M.U. and the Association withdraws recognition.

1. Following an attempt to merge it with the tugboat local, the deck scow local votes to consider disaffiliation from the U.M.D.

On April 3, 1960, Tugboat Local 333 President O'Hare attended a special meeting of Local 335 and spoke on the desirability of Local 335's merging into his tugboat local. The membership of Local 335 voted a referendum on the merger but at the next meeting the action was rescinded. At the latter meeting, to secure a larger attendance, the regular meeting was changed from the third Monday to the third Sunday of each month and a printed notice to that effect was distributed to the membership.

At the regular meeting of Local 335 on May 15, the membership voted to accept the resignation of the local's secretary-treasurer, Hugo Kasten, and elected Thomas Wilhelm to fill Kasten's unexpired term ending in October. A motion was also adopted to hold a special meeting on May 29 to vote whether Local 335 should disaffiliate from the U.M.D.-N.M.U.

On May 17, Secretary-Treasurer Wilhelm discharged the local's clerk, Thomas Anglim. The same day Wilhelm wrote and distributed to the membership a letter which described the meeting on May 15 and gave notice of the special membership meeting on May 29 to vote on disaffiliation. The next day Thomas Anglim appeared at the hiring hall of Tugboat Local 333, where a sign was posted which read "(Deck Scow) Local 335."

2. The U.M.D. purports to impose a trusteeship on the deck scow local.

On May 20, Willard Quick, secretary-treasurer of Tugboat Local 333 and of the U.M.D. wrote the Association

on a U.M.D. letterhead stating that as the "parent organization of Local 335" the U.M.D. had appointed Thomas Anglim, the former clerk of Local 335, as "temporary administrator" of Local 335 to replace the elected officers of the local, and advising the Association to deal with Anglim at the U.M.D. office in all matters concerning the contracts until further notice.

On May 23, David Graham, for 25 years delegate of Local 335 and one of its two paid officers, wrote the Association that as Local 335's duly elected representative he would continue to transact its business "in accordance with the contract now in force." The letter called particular attention to the contract provision requiring the use of the local's hiring hall and stated that the local would "insist on strict compliance with all other provisions of the contract." Graham delivered the letter personally to William Cleary, executive vice president of the Association, who asked what had happened; Graham replied, "I am still doing business at the same old stand."

On May 26, the Association met and, as a result of the conflicting claims arising from Quick's and Graham's letters, decided to retain counsel. A day or so later, Cleary called a U.M.D. representative, either Quick or William Hannan, its counsel, to ask if there were any further developments in the internal situation of the union. He was advised that the U.M.D. would administer the Local 335 contract through Anglim and expected the Association to live up to the contract; Cleary responded that the Association would do so.

3. The deck scow local disaffiliates from the U.M.D. and the Association withdraws recognition.

On May 29, Local 335's special meeting on disaffiliation was held pursuant to the motion passed on May 15 and the notices mentioned above. First, the motion was adopted

that if the local disaffiliated all its assets, including the contracts with the Association, would remain the property of the local. A vote by secret ballot was then held, with about 130 voting for disaffiliation and about 14 against. A committee was appointed to seek affiliation with some international union and report to the membership. That day Wilhelm wrote the Association advising of the local's action and the resultant change of name and requesting that future correspondence be directed to "this Local Union unaffiliated" at the same address until further notice.

On May 31, the Association met and determined to adhere to the substantive portions of the contract but not to use either local as a hiring hall. On June 2 Wilhelm wrote the Association that the employers were violating the contract by not reporting vacancies to the union. The letter requested the Association to cease the violation and to furnish Local 335, Independent, with the names of all deck scow captains hired since May 16.

On June 10, Wilhelm again wrote the Association concerning the failure to comply with the hiring hall provision of the contract and requesting a meeting on June 15 "to hear, determine and attempt to resolve the above dispute." The same day Wilhelm mailed and distributed to the membership a letter announcing that the International Brotherhood of Teamsters, the International Longshoremen's Association, the National Maritime Union, and the Seafarers International Union had been invited to attend a meeting June 19 at which the membership would vote on renewed international affiliation.

On June 14, the Association met and discussed the possibility that Local 335, Independent, would affiliate with the Seafarer's International Union or some other international union. The fear was expressed that if the local did so there could be "grave implications" arising from possible conflict between the N.M.U., which still included the tugboat local,

and the new international. The Association determined that the "most prudent course" would be to stay with the U.M.D.-N.M.U. and as a result of this meeting Cleary wrote Wilhelm that neither they nor their members have any contract with Deck Scow Captains' Local 335 and they will not meet with them. The letter asserted that the Association's contract was with the U.M.D. affiliate and that the Association had been advised that Mr. Jim Murray had been appointed administrator . . . and Mr. Tom Anglin was the office manager. Cleary's letter was reproduced and distributed to the Association members and to the U.M.D. It was the only reply the Association made either to Wilhelm's requests for meetings and for information or to Graham's letter.

On June 15, Wilhelm replied that Cleary's letter represents an obvious breach of agreement in effect between the Local, the Associatfon and its members. The letter recited the events of the disaffiliation meeting and enclosed a certified copy of the resolution assigning all assets, including the contracts, to the disaffiliated local. It also advised that the local would vote on affiliation with another international on June 19 and again requested a meeting.

4. The deck scow local affiliates with S.I.U.

On June 19, by secret ballot, Local 335 voted to affiliate with the Seafarer's International Union by a vote of 160 to 5 for all other choices. On June 20 Wilhelm wrote the Association of the new affiliation and stated that Local 335 expected the Association and its members to immediately honor its contractual obligations with Local 335. Cleary did not reply but distributed copies of Wilhelm's letter to the Association members with the notation that the letter required no action.

C. Association member discharges two employees and deck scow captains strike; following the strike the S.I.U. withdraws its charter.

Meanwhile, on June 9, O'Hare wrote a large number of the deck scow captains announcing that James Murray Miller, business agent of Tugboat Local 333, had been appointed business agent of Local 335 as well, that Anglim was administrator and that only these two were authorized to collect dues. The letter requested the addressee to sign and return a pledge card and an application for membership in Local 335, U.M.D.-N.M.U. which were enclosed. It also enclosed, without comment, a "Constitutional and By-Laws of Local 335, United Marine Division, National Maritime Union" which stated that it was effective May 15, 1960 and differed substantially from the one then in effect. In a later undated letter to deck scow captains, O'Hare and Miller again requested the addressees to fill out a new application card.

Thomas Serpa and Antonio Da Cruz, deck scow captains employed by Suffolk Dredging Corporation, an Association member, were members of Local 335 before May 29. On July 15 two men approached Serpa at work and asked to see his union card. Serpa showed his card, indicating dues paid to Local 335, S.I.U.; one of the men remarked that that was not good that they didn't want him. The men spoke to Superintendent Peterson, who also remarked that Serpa's card was "no good." Shortly afterward, Peterson told Serpa that he would have to let him go, but that if Serpa joined with "that man" he could go back to work; Serpa declined and left.

That same day Business Agent Miller asked Da Cruz to accept "a yellow card (from Local 335, U.M.D.-N.M.U.) as a new union." Miller told him, "If you don't join our union then you will have to leave the boat" and a few minutes later Supervisor Madden, after talking with Miller, told

Da Cruz to leave the boat. Miller then directed a nearby tugboat captain not to move Da Cruz's scow unless Da Cruz agreed to join with Local 335, U.M.D.-N.M.U. After further discussing union membership with Da Cruz, Peterson told him, that he was fired and should get out of the boat and Da Cruz left.

On June 17, Local 335, S.I.U. voted 367 to 1 to strike against Suffolk and against Colonial Sand & Stone Co., another Association member. The strike, which was accompanied by picketing, began July 20 and lasted five days. At the conclusion of the strike, Da Cruz and Serpa were reinstated to their jobs.

In September 1960, the S.I.U. withdrew the charter it had granted to Local 335 and the local thereafter remained independent.

D. Local 335, U.M.D., threatens further discharges and causes the discharge of employee Elgahim.

Robert Bicknell, a scow captain, employed by Colonial Sand & Stone Co., paid his dues to Local 335, S.I.U., in July 1960, for the balance of the year. On November 7, 1960, he was told by Richard Baard, a Colonial supervisor, that he was being laid off, presumably because he did not belong to the "other union." Bicknell and Baard then telephoned Anglim, the U.M.D. administrator, who said he knew of no order to lay off Bicknell, and Baard thereupon restored him to the payroll. On November 9, Bicknell went to see Anglim about the incident and talked to Miller, the U.M.D. business agent, instead. Miller told Bicknell that before the end of the year, all deck scow captains would have to join Local 335, U.M.D. or they would not work.

Husseim Elgahim was employed by Colonial in October 1960 after he had been referred by Miller. In January 1961 agents from both the Independent and U.M.D. locals approached Elgahim for dues. He promised to pay the In-

dependent first and told the U.M.D. he would not pay two unions. On January 9, the U.M.D. representative again demanded dues and told Elgahim that if he did not pay he would be laid off. Shortly afterwards, Anglim asked Chief Dispatcher Regazzi to have Elgahim laid off for failing to pay dues and Regazzi did so. Elgahim then went to Wilhelm who called Regazzi about it; Regazzi said that he had let Elgahim go because he had not paid his union dues, continuing to observe, "I wish you two guys would get it straightened out down there. We recognize the local, the U.M.D." On January 16, after unfair labor practice charges had been served, Colonial reinstated Elgahim.

The Board found that Local 335, Independent, was the alter ego or continuance of the organization that entered into the 1959 contracts and that after May 29, the Union calling itself Local 335 U.M.D. was basically a different organization. Thus Local 335, Independent, retained possession of the assets, records and offices of the contracting union. Until its regular election in October 1960, its officers were those elected prior to the disaffiliation, including David Graham, who had been delegate of the deck scow local for 25 years through all the changes in affiliation. Its members continued to use their old membership cards and it operated under the old constitution. On the other hand, the administrator appointed by O'Hare, whether the Independent's discharged clerk Anglim or the Tugboat local's business agent Miller, neither demanded nor obtained the possession of the local's assets, records or offices nor assumed its obligations. Moreover, O'Hare and Miller solicited the deck scow captains to sign new applications for membership and Miller threatened Elgahim with discharge if he did not accept a yellow card and "join our union." O'Hare circulated a new constitution purportedly effective May 15, 1960, which differed substantially from the old one, provided for associate membership during "organizational periods," and allowed O'Hare to appoint all officers. In short, before and after the disaffiliation

vote on May 29, the Wilhelm group had all the contracting union's accouterments except its name, while the O'Hare group had the name and nothing else.

As to the disaffiliation election of May 29, 1962, the Board found this was ratified by the membership of the Union by their signing of S.I.U. cards and the strike vote.

Also the Board found that the evidence in the record tended to disprove the existence of any U.M.D. Constitution, said Constitution would have been the one granting the U.M.D. the authority to appoint an administrator. (Record Vol. III, pp. 5a-77a.)

II. The Board's Conclusions and Order

The Board found that by withdrawing recognition from Local 335, Independent, which was the contracting union, the Association violated Section 8(a)(5) and (1) of the Act, and that by granting recognition to Local 335, U.M.D., the Association also violated Section 8(a)(2). The Board further found that Colonial and Suffolk violated Section 8(a)(3) and (1) by discharging employees Serpa, Da Cruz and Elgahim because they failed to join Local 335, U.M.D., and that by requesting the discharge of Elgahim and threatening to secure the discharge of all the other deck scow captains who did not join it, Local 335, U.M.D., violated Section 8(b)(1)(A) and (2) of the Act.

The Board's order requires the Association or its members individually to recognize Local 335, Independent, as the collective bargaining representative of the deck scow captains, and to cease recognizing Local 335, U.M.D., unless the Board certifies the latter as the collective bargaining representative of its employees. The order requires Suffolk, Colonial, and Local 335, U.M.D., to cease the unfair labor practices complained of and respectively to make Serpa, Da Cruz, and Elgahim whole for the loss of pay resulting from

the discrimination against them. Finally, all the above are required to post the customary notices (Rec. Vol. III, pp. 5a-6a).

III. Court's Decisions

This case came before the Court of Appeals for the Second Circuit on petitions for review of the Board's Order filed by the Harbor Carriers of the Port of New York and a number of its members (Rec. Vol. IV, p. 12) and the Request for Enforcement filed by the Board (Rec. Vol. IV, p. 21).

The Court of Appeals, in a two to one decision, denied enforcement and set aside the Board Order (Rec. Vol. IV, pp. 45-62).

The Court majority decided that the Local 335 did not ratify the disaffiliation vote because it stated that the significance of S.I.U. cards signed by the men may be interpreted differently than the Board interpreted them and the strike vote was interpreted by the Court as not a ratification of the disaffiliation, contrary to the Board's interpretation (Rec. Vol. IV, pp. 54-55).

The Court held that the old organization continued to function under the administration of one of its paid officials, who had been discharged by the Secretary-Treasurer of the Union (Rec. Vol. IV, pp. 55-56).

The Court stated that the fact that Local 335, Independent, had the same officers and all the assets of its predecessor did not indicate a continuation of identity, contrary to the Board's interpretation (Rec. Vol. IV, pp. 54-55).

The Court did not deal with any of the conduct of Local 335, U.M.D.-N.M.U., *i.e.* the signing of new pledge cards, the new constitution, etc., which the Board stated indicated that it was a new organization.

A petition for rehearing was filed on behalf of the intervenor, Local 335, Independent, on the grounds that the Court based its decision on a mistaken finding of fact and a mistaken application of the Board's criteria (Vol. IV, pp. 64-73). The mistaken finding of fact being that the Court found one of the paid officials continued on in the new Local 335, U.M.D.-N.M.U., as administrator, whereas the uncontroverted fact is that said administrator was merely the clerk of the union, an employee, and not in any way an official. Therefore, the Court was faced with the fact that his only grounds for authority was his appointment as administrator, and the U.M.D. had no constitution under which to appoint him. The Court denied this latter petition (Vol. IV, pp. 74-80).

ARGUMENT

I. The Court of Appeals drew inferences and conclusions from the facts contrary to the reasonable inferences and conclusions drawn by the Board.

The Board determined that because of certain criteria and actions, Local 335, Independent, was the alter-ego and continuation of the former Local 335, U.M.D.-N.M.U. The Board, with its expertise, interpreted the significance and importance of certain occurrences and incidents, *i.e.*, the significance of the continuance of officers and retention of assets, by Local 335, Independent, and the solicitation of new cards, the distribution of a new constitution, etc., by the new Local 335, U.M.D.-N.M.U., as well as the significance for ratification of the disaffiliation vote of the signing of S.I.U. cards and the strike vote. The Court majority, in dismissing the Board's order, ignored entirely certain of these facts and as to others it imposed its own interpretation as to their significance in determining the ultimate finding of fact, *i.e.*, which union was the continuation of the old Local 335, U.M.D.-N.M.U.

The Board in its expertise interpreted these facts as indicating Local 335, Independent, was the continuation of the old Union. The Court took these same facts and, ignoring the expertise of the Board, interpreted them their own way. The Board's interpretations as to the significance and meaning of these facts were at least as reasonable as the majority of the Court's. In fact, Justice Kauffman, in his dissent agreed with the Board's findings. Clearly, there was substantial evidence to support the Board's conclusion as to this ultimate finding of fact, that is that Local 335, Independent, was the alter ego of the old Union.

It was stated in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474, 71 S. Ct. 456 (1951), at 488:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

If this rule is applied to the primary facts, it is only reasonable that this same rule should apply to the ultimate

facts. If the inferences drawn by the Board, in its expertise, are reasonable, they should not be set aside by a reviewing court because it would not have drawn these same inferences. See *N.L.R.B.* v. *Southern Bell T. & T. Co.*, 319 U. S. 50, 60, 63 S. Ct. 905, 910 (1943).

It is clear that the Board does and must have this power to draw reasonable inferences in order to adequately perform its functions. By virtue of its expertise, the Board is best equipped to draw these inferences. *Radio Officers Union, etc. v. N.L.R.B.*, 347 U. S. 17, 48-52, 74 S. Ct. 323, 340-342 (1954), and they should only be set aside if they are wholly unreasonable or unwarranted. *N.L.R.B.* v. *Southern Bell T. & T. Co., supra.*

Since the Board was correctly acting within its discretion in determining that under the facts of this case the employer's conduct constituted an unfair labor practice, this matter may be summarily disposed of in the granting of the writ of certiorari. See *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U. S. 938, 77 S. Ct. 261 (1956).

II. The trustee was appointed in violation of Section 302 of the Labor Management Reporting and Disclosure Act, and therefore since he was the only indicia of the existence of the organization which he headed, said organization cannot be considered a labor organization within the provisions of the National Labor Relations Act.

The Court of Appeals majority has mistakenly based their opinion and decision upon findings not supported by the Board's order or the record and contrary to facts uncontroverted by any of the parties. As a result, that Court's majority failed to reach an issue decisive of this proceeding. Such issue is novel, of far reaching consequences and one of first impression before this Court. It involves the extent and impact upon labor organizations and labor management re-

lations of Section 302 of Labor Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 531, 29 U. S. C. Sec. 462 (Appendix A, p. 24), restricting the imposing of trusteeships by labor organizations upon subordinate bodies and the accommodation of such section with provisions of the National Labor Relations Act.

The Board found that Local 335, Independent, was the continuance of Local 335, United Marine Division, and that the administrator organization was a new organization and not such a continuance. Consequently the failure of the respondents to continue to recognize the Independent and their recognition of the administrator entity constituted violations of the Act.

The majority opinion in setting aside and refusing to enforce the Board's order, *inter alia*, found that: "Of the two paid officers, it appears that one remained loyal to the old union and was appointed administrator of its affairs, while the other associated himself with a new organization" (the Independent). The majority of the Court further found that: "the old organization did not disappear or become 'defunct'. It continued to function actively under the administration of one of its paid officials, who had been 'discharged' by the new secretary-treasurer, the leader, apparently, of the secession movement." Such findings as to the paid officers, the loyalty of one to the "old" union, his appointment as administrator, the "old" organization functioning actively under his administration, his discharge, are it is respectfully submitted, mistake of facts. On the contrary the Board found and respondents admit that the two paid officials remained at all times with the Independent; that the administrator appointed was never an officer, let alone a paid official, but on the contrary a clerk, merely an office employee of Deck Scow Captains Local 335, U.M.D., immediately prior to his appointment as administrator, and the individual who was so discharged by Secretary Treasurer Wilhelm immediately prior to his appointment as such administrator. So

that contrary to the Court's finding, there was no continuation of the active administration of the old organization by one of its "paid officials." By reason of this error, to wit, that the old organization continued functioning actively under the administration of its paid official and not under a trustee or administrator, it appears that the Court found it necessary and did not reach the issue presented by Section 302 of the Labor Management Reporting and Disclosure Act (Appendix A, p. 24), which issue had been raised by the intervenor, both before the Board and the Court.

It is submitted that the foregoing question is decisive of this case. For if it is found that as a matter of law, the trusteeship was illegal, said trusteeship being the sole indicia of the existence of the labor organization, then factually there was and could only be one organization, to wit, the Independent. At all times material herein, trusteeships could only be established in accordance with the provisions of such Section 302 (Appendix A, p. 24). Trusteeships may only be established when there is written constitutional authority for such action. Absent proof of such authority a trusteeship is violative of the law, nor is there any inherent power within a parent organization to impose such a trusteeship. The record is devoid of any constitutional authority for the United Marine Division's imposition of a trusteeship. On the contrary, the Board found evidence in the record to disprove even the existence of any United Marine Division constitution, but made no finding on this point on the ground that it was not necessary, and on the further ground that it was immaterial to the issues therein. The Board concluded that it was not its function to determine violations of such Section 302 (Appendix A, p. 24). However, before this Court is this very issue. Can an organization established in violation of law, contrary to public policy, be deemed a continuation of Deck Scow Captains Local 335, UMD? To find affirmatively would produce the incongruous spectacle of laws adopted to protect and preserve industrial

stability and employee rights, being blunted and disregarded and the illegal result, utilized by the wrong-doers to their benefit. Certainly such conduct could never be sanctioned by a Court.

The trusteeship which the United Marine Division attempted to create on May 20th, and which the respondents recognized even prior to the May 29th vote, was a nullity as a matter of law. This status the respondents could easily have ascertained by the simple expendient of inquiring as to the authority for the trusteeship, mandated by Congress by virtue of such section 302. There was and could only be one organization, the same union that made the 1959 contracts, which entity the respondents on May 20th, and May 27th, ceased to recognize and which, as the Board found, was never defunct, but continued on irrespective of the appellation UMD or Independent.

Patently in the posture of this case, absent the presence of the Administrator or trustee organization by virtue of its invalidity, there could not and as a matter of law was not any basis for conflicting claims, nor rival unions, a situation comparable to two of this Local's previous disaffiliations when the Local first changed its affiliation from the United Mine Workers to a Federated Local of the AFL and then from the AFL to the United Marine Division, National Maritime Union, both upon votes of the members at singular meetings, without appropriate notice, and attended by only a mere handful of its members. In each of the said instances the respondents continued their recognition of the Local Union as a continuation of the same entity.

The above issue constitutes an interplay of the provisions of the National Labor Relations Act (Appendix A, pp. 21-22) with that of the Labor Management Reporting and Disclosure Act (Appendix A, pp. 22-24). Such issue is not of first impression before this Court and is most novel and of extreme importance concerning the administration of the affairs of labor organizations with substantial impact upon labor management relations.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the Second Circuit reversed or at least this matter should be set down for argument.

Respectfully submitted,

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HOWARD SCHULMAN,
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December, 1962.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, et seq.), are as follows:

Unfair Labor Practices

Sec. 8(a). It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membershp.

REPRESENTATIVES AND ELECTIONS

Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employments: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: * * *

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 531, 29 U. S. C. 462) are as follows:

Sec. 2. DECLARATION OF FINDINGS, PURPOSES AND POLICY

(a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection;

that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

Sec. 302. Purposes for Which a Trusteeship May Be Established

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and by-laws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 389-91—September Term, 1961.

(Argued June 14, 1962 Decided July 31, 1962.)

Docket Nos. 27544, 27550, 27560

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC., and ROCKVILLE SCOWS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO,

Respondents.

Before:

FRIENDLY, KAUFMAN and HAYS, *Circuit Judges.*

Petitions to set aside certain orders of the National Labor Relations Board based upon findings of violation of the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* The Board seeks enforcement of these and another order.

Orders set aside; enforcement denied.

ROMAN BECK of Krisel, Beck & Taylor, New York, N. Y. (Arthur Karger, of counsel, on the brief, *for petitioners Harbor Carriers of the Port of New York.*

CHRISTOPHER E. HECKMAN of Foley & Martin, New York, New York (James S. Reardon, of counsel, on the brief), *for petitioners Gallagher Bros. Sand & Gravel Corp., Bilkay Holding Corp., Hampton Scows, Inc., Neptune Line, Inc., and Rockville Scows, Inc.*

RICHARD L. NEWMAN of Kanner, Hannan & Newman, New York, N. Y. (William J. Hannan, of counsel, on the brief), *for respondent Deck Scow Captains, Local 335, United Marine Division, National Maritime Union, AFL-CIO.*

MELVIN J. WELLES, Attorney, National Labor Relations Board, Washington, D. C. (Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Elliott Moore, Attorney, on the brief), *for petitioner-respondent National Labor Relations Board.*

HOWARD SCHULMAN, New York, New York, *for intervenor, Deck Scow Captains, Local 335, Independent.*

HAYS, *Circuit Judge*:

The petitioners, an employers' association and certain individual employers, seek review of orders entered against them by the National Labor Relations Board and based upon that Board's finding of violations of the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* (1958). We hold that the orders must be set aside.

For a number of years the employers have had collective bargaining agreements with Deck Scow Captains Local 335, United Marine Division, National Maritime Union, AFL-CIO, as representatives of their employees working on scows.[1] The most recent of these agreements was executed in 1959 for a period to end on March 31, 1961.

At a membership meeting of Local 335 held on May 15, 1960, a motion was adopted providing for a special meeting to be held on May 29, 1960 for the purpose of discussing the disaffiliation of Local 335 from the United Marine Division of the National Maritime Union.

At the meeting which was held on May 29 "about" 130 of those in attendance voted for disaffiliation and "about" 14 against. The Local had at that time approximately 750 members.

In the meantime on May 20 the United Marine Division designated a "temporary administrator" of the affairs of Local 335 and wrote to the employers advising them to deal with the administrator on all matters concerning the collective agreement. This same advice was repeated in response to a telephone call from an employer representative on May 27 or shortly thereafter. In fact at all times since these dates representatives claiming to act for Local 335, United Marine Division, have continued to demand that the employers observe the terms of the collective agreement. The employers, on their side, have acceded to these demands and have recognized and dealt with that Local.

After the disaffiliation vote of May 29, representatives claiming to act for "Local 335, Independent" also wrote to the employers informing them of the action which had been taken and from time to time thereafter demanded that the employers deal with that Local. The employers refused to do so and continued to bargain with Local 335, United Marine Division.

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[1] As each scow has only one employee there is no question of the scow captains being "supervisors" and thus exempted from the operation of the Act, § 14(a), 29 U. S. C. § 164(a) (1958).

It is the employers' refusal to deal with Local 335, Independent, which is the gravamen of the Board's complaint. (Section 8(a)(5), 29 U. S. C. § 158(a)(5).) The other charges which the Board sustained, and the resulting orders, are all based upon the charge of refusal to bargain. Since if that charge falls the rest must follow, we shall deal only with the charge of refusal to bargain.

The employees involved were represented by Local 335, United Marine Division, prior to May, 1960 and the employers were required by the Act to bargain with that Local as the representative of their employees. The only means provided by the Act for effecting a change of representatives is through a Board-conducted election by secret ballot. Section 9(e), 29 U. S. C. § 159(e). It is apparently assumed by the Board, and we accept the assumption, that in the absence of such an election the employer was required to continue to bargain with the representatives "currently recognized." (Section 9(c)(1)(A), 29 U. S. C. § 159(c)(1)(A).)

The Board concedes the correctness of these propositions but seeks to escape their consequences by holding that Local 335, Independent, was a continuation of Local 335, United Marine Division, and that therefore no change in bargaining representatives took place. The decision thus turns entirely upon the correctness of the finding that Local 335, Independent, is, under a new name, the same organization as Local 335, United Marine Division.

Unless it is established that Local 335, Independent, is the same organization as Local 335, United Marine Division, the employers would be required by the Board's familiar contract bar doctrine[2] to continue to deal with Local 335, United Marine Division, during the period of the contracts

[2] For a discussion of the contract bar doctrine, including a consideration of legislative history, see Judge Friendly's opinion in *Local 1545, United Bhd. of Carpenters* v. *Vincent*, 286 F. 2d 127 (2d Cir. 1960).

with that organization.[3] Far from being required to recognize and bargain with Local 335, Independent, the employers would commit an unfair labor practice if they did so while the contracts with Local 335, United Marine Division, were still in force. And this would be true even if there was evidence which clearly established that Local 335, United Marine Division, had been repudiated by a majority of the employees and that a majority wished to be represented by Local 335, Independent.[4] Thus the issue in the present case is not whether a majority of the employees wished to have Local 335, Independent, rather than Local 335, United Marine Division, as their representative. Even if the evidence could be said to establish that they did, the employers would still have been required to bargain with Local 335, United Marine Division.

It is true that the Board claims that the application or waiver of the contract bar rule is a matter of discretion for the Board to determine and that it "may be applied or waived as the facts in a given case may require in the interests of effectuating the policies of the Act" [5] and that this position has been approved by the courts.[6] In the present

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[3] The contract bar doctrine applies although the union involved is not certified by the Board. See *Asplundh Tree Expert Co.*, 92 N. L. R. B. 1013 (1950); *United States Time Corp.*, 79 N. L. R. B. 1135 (1948).

[4] *N. L. R. B.* v. *Marcus Trucking Co.*, 286 F. 2d 583 (2d Cir. 1961). The same result has been reached under the one-year certification rule, the purpose and effect of which are identical. See *Brooks* v. *N. L. R. B.*, 348 U. S. 96 (1954); *Carpinteria Lemon Ass'n* v. *N. L. R. B.*, 240 F. 2d 554 (9th Cir. 1956), cert. denied, 354 U. S. 909 (1957); *N. L. R. B.* v. *Henry Heide, Inc.*, 219 F. 2d 46 (2d Cir.), cert. denied, 349 U. S. 952 (1955); *N. L. R. B.* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541 (2d Cir.), cert. denied, 323 U. S. 714 (1944).

[5] *Hershey Chocolate Co.*, 121 N. L. R. B. 901, 905 (1958). See *Ford Motor Co.*, 95 N. L. R. B. 932, 934 (1951).

[6] See *N. L. R. B.* v. *Grace Co.*, 184 F. 2d 126, 129 (8th Cir. 1950); *Local 1545, United Bhd. of Carpenters* v. *Vincent*, 286 F. 2d 127, 131 (2d Cir. 1960). But cf. *Fay* v. *Douds*, 172 F. 2d 720, 724 (2d Cir. 1949) ("* * * we assume that the 'contract bar' is, as it were, written into the statute * * *").

case the Board did not purport to waive the contract bar rule, nor is there any indication that such a waiver would effectuate the policies of the Act. Moreover, the accepted significance of waiver of the contract bar rule, is that an election will be held for the purpose of choosing between the old and a new representative, not that the employer will be guilty of an unfair labor practice for refusing to bargain with a new organization claiming the right to represent.[7] In fact it would be entirely arbitrary and unreasonable for the Board, waiving the contract bar rule for the purposes of this case, to hold the employers guilty of an unfair labor practice for bargaining with the union with which they had contracts and with which, therefore, they had every reason to believe that they were required to bargain.

But if, in spite of these considerations, it could be held that the Board exercised its discretion to waive the contract bar rule, the Board would still not be justified, absent an election, in finding the employers guilty of refusing to bargain with a new representative unless that finding was based upon evidence that the employers did not have a "good faith doubt" that the new organization represented a majority of the employees. *N. L. R. B.* v. *Philamon Labs.*, 298 F. 2d 176, 179 (2d Cir. 1962); *N. L. R. B.* v. *Jackson Press, Inc.*, 201 F. 2d 541, 544 (7th Cir. 1953). In the present case, not only did Local 335, Independent, fail to present any adequate evidence of majority representation, but there is no finding as to good faith since the Trial Examiner, whose findings, conclusions and recommendations were adopted by the Board, refused to pass upon that issue, stating that the employers' "motives or good faith are not material."

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[7] See Mayer, A House Divided—The Schism Doctrine, 22 Ohio St. L. J. 154 (1961); Naumoff, An Analysis of the Contract Bar Doctrine, 7 Lab. L. J. 197, 227 (1956); Note, The Schism Doctrine, 45 Va. L. Rev. 211 (1959); Note, Employee Repudiation of Bargaining Representatives: An Appraisal of Existing Restrictions, 66 Yale L. J. 223, 232 (1956), and numerous Board cases cited in these articles.

Thus it is clear that support for the Board's conclusion, if it has any basis in law, must rest solely and entirely on the finding that Local 335, Independent, was a continuation under a new name of Local 335, United Marine Division, and not a new organization claiming the right to represent the employees.

In examining the evidence on which the Trial Examiner reached his conclusion, we will accept his premise that a mere change in a labor organization's name or affiliation will not serve to change the identity of that organization. If the members of Local 335, United Marine Division, merely determined to change the name of that organization and to disaffiliate from the United Marine Division there would be reasonable ground for holding that the new organization was only a continuation of the old and that the employers must continue to bargain with that organization. If, however, some of the members of the Local, even a majority of them,[8] decided to withdraw from the Local and to form a new organization, the employers, under the principles already discussed, would be required to continue to bargain with the organization with which they had contracted, at least until the Board ordered a new election, or, if the contract bar rule were "waived," until the new organization presented proof which would dispel any good faith doubt of its majority support.

What is the evidence on which the Trial Examiner relied as establishing that the Local continued as the same organization rather than that a new organization was formed by the withdrawal of some of the members of the old Local? The focal point is the vote at the meeting of May 29 together with subsequent "ratification." But the May 29 vote can establish at most only that "about" 130 members out of a

[8] Where only five percent of the members remained loyal to the old organization the Board held that the organization continued to be the bargaining representative. *Montgomery Ward Co.*, 68 N. L. R. B. 369, 372, n. 3 (1946). See also *Great Lakes Carbon Corp.*, 44 N. L. R. B. 70, 72, n. 1 (1942) (same where one-third of the members remained loyal).

total of about 750 wished to disaffiliate from the United Marine Division (and that "about" 14 did not).[9] Of this vote the Trial Examiner said:

> "Taking into consideration the peculiar nature of the industry, as described above, and the facts as to the meeting of May 29, in particular, I conclude that the vote there taken was not, standing alone, fairly representative of the wishes of the majority of the local's members, a substantial portion of whom were in effect disenfranchised."

Keeping in mind that the issue is not whether a substantial part of the membership wished to withdraw from the Local and form a new organization, but whether the old organization merely changed its name and affiliation, what is to be said of the subsequent "ratification" of this disaffiliation vote? The Trial Examiner finds that the vote was ratified by "a substantial majority of the employees" by the fact that "approximately" 500 signed cards "accepting the affiliation of Local 335, Independent, with the S.I.U. [Seafarer's International Union]" and "an approximately equal number" signed up for strike duty in July.

On June 19, 1960 there was a membership meeting at which a vote was taken on affiliation with the Seafarer's International Union. The vote was 160 to 5 in favor of such affiliation. The evidence as to the "acceptance" of this affiliation was as follows:

> "Q. Did you submit to the membership at large by means of any referendum the question of ratification of the acceptance of the SIU charter by mail ballot, to be specific? A. No. We didn't have no referendum. We had 500 cards that they signed to accept and stay in the SIU.

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[9] In *Hershey Chocolate Co.*, 121 N. L. R. B. 901 (1958), where the vote for disaffiliation was 829 to 1, the board did not recognize the new union as the successor to the old, but ordered an election to permit the employees to choose between the two organizations.

Q. I thought you said you didn't issue new cards. A. That was the membership wished. If they wished to stay in the SIU.

Q. Just explain that a little to me a little more fully. I don't understand.

Trial Examiner: I am puzzled, too.

Q. About these 500 cards. Who signed the cards? A. The membership.

Q. Where were they signed? A. On barges. At the hall.

Q. Who presented them for signature? A. The delegate. Myself and the Executive Board.

Q. Were these cards: you say are all dated and signed after the affiliation? A. These cards are signed during the affiliation and why we were affiliated.

Trial Examiner: When you say 'affiliation,' you mean after the issuance of the charter?

Mr. Beck: Right."

Even if this rather informal evidence is to be accepted, and even if we were to assume that a vote of majority to disaffiliate from one organization and to join another establishes that the new organization is a continuation of the old, there is no evidence whatever as to the form or content of the cards which the employees are alleged to have signed. Contrary to the finding of the Trial Examiner, the evidence establishes that the employees by signing the cards were not "ratifying" the vote on disaffiliation. The cards referred to a completely different matter, *i.e.*, affiliation with the Seafarer's. For all that appears a large number of the signers may have preferred not to disaffiliate from the United Marine Division, but, if such disaffiliation was inevitable, then and only then to affiliate with the Seafarer's.[10]

The fact that "approximately" 500 employees signed up for strike duty in July is equally unconvincing as ratifica-

[10] Employees frequently sign authorization cards in more than one union. See *Save Elec. Corp.*, 49 N. L. R. B. 1030, 1034 (1943).

tion of the disaffiliation vote taken two months before. The strike did not have as its object recognition or bargaining with the new organization but was occasioned by the discharge of some of the employees. Moreover, willingness to support such a strike could at best suggest majority support for the new organization. It does not tend to establish that the new organization is a continuation of the old.

Defection of officers and seizure of assets are by no means indications that the old organization is continued in the new. Officers are more likely to lead secession movements than are the rank and file, and it may well be that members are unduly influenced in their choice of whether to remain with the old organization or to join the secessionists by reason of the consideration of which group controls the assets. See *Kearney & Trecker Corp.* v. *N. L. R. B.*, 210 F. 2d 852, 857-58 (7th Cir.), cert. denied, 348 U. S. 824 (1954). In the present case, moreover, the president, vice-president and one of the trustees apparently did not join the secession but resigned their offices. Of the two paid officers, it appears that one remained loyal to the old union and was appointed administrator of its affairs, while the other associated himself with the new organization.

The procedure of disaffiliation did not accord with the requirements of the union constitution, but it is not necessary in this case for us to pass upon the Board's position that it will not consider in situations of this kind the legality of disaffiliation under the provisions of the union constitution. (See *Hershey Chocolate Corp.*, 121 N. L. R. B. 901, 905-06 (1958); *Radionic Prod. Div.*, 91 N. L. R. B. 595 (1950); *Brightwater Paper Co.*, 54 N. L. R. B. 1102, 1106 (1944). But see *M & M Wood Working Co.* v. *N. L. R. B.*, 101 F. 2d 938, 941 (9th Cir. 1939); *Douglas and Lomason Co.*, 34 N. L. R. B. 69 (1941).) Even if the Board is right on this point, it seems clear that the withdrawal of members in the present case created a new organization.

The old organization did not disappear or become "defunct." It continued to function actively under the administration of one of its paid officials, who had been "dis-

charged" by the new secretary-treasurer, the leader, apparently, of the secession movement. Promptly after the secession began it claimed to be the rightful holder of the contract and from its new headquarters it administered the contract to the extent it was permitted to do so.[11] So far as we can tell from the evidence it may have had the support of anywhere from 14 to over 600 of the members. Only an election could have resolved that question.

The court decisions cited by the Trial Examiner in support of the proposition that a mere change in name or affiliation does not change the identity of a contracting organization [12] are all distinguishable.[13] In none of these cases were there two unions claiming bargaining rights. In none of them was there any secession movement from an existing organization. In *Carpinteria*, the C. I. O. which had directly chartered the local involved suggested that it become a local of one of the CIO-affiliated internationals. The members voted unanimously to do so. In *Harris-Woodson Co.*, the union was prevented from taking advantage of the Board's aid by the failure of the C. I. O. to file the then required affidavits. It thereupon changed its affiliation so that the employer could be ordered to bargain with it. (For the Board's own comment on the *Harris-Woodson* case, see quotation from *Sears Roebuck & Co.*, 110 N. L. R. B. 226 (1954), *infra.*) In *Continental Oil*, the international with which the

[11] For a case in which the Board refused to hold an election to determine representatives where the old union was willing to administer the contract, see *Youngstown Steel Door Co.*, 116 N. L. R. B. 986 (1956).

[12] *N. L. R. B.* v. *Weyerhaeuser Co.*, 276 F. 2d 865 (7th Cir.), cert. denied, 364 U. S. 879 (1960); *Carpinteria Lemon Ass'n* v. *N. L. R. B.*, 240 F. 2d 554, 557 (9th Cir. 1956), cert. denied, 354 U. S. 909 (1957); *N. L. R. B.* v. *Harris-Woodson Co.*, 179 F. 2d 720, 723 (4th Cir. 1960); *Continental Oil Co.* v. *N. L. R. B.*, 113 F. 2d 473, 477-8 (10th Cir. 1940), remanded on other grounds, 313 U. S. 212 (1941).

[13] In *Dickey* v. *N. L. R. B.*, 217 F. 2d 652 (6th Cir. 1954), and *M & M Wood Working Co.* v. *N. L. R. B.*, 101 F. 2d 938 (9th Cir. 1939), the Board's finding that a new organization was but a continuation of the old was set aside.

union was affiliated changed its name and its affiliation from A. F. L. to C. I. O. In *Weyerhaeuser*, the international with which the union was affiliated disaffiliated from the A. F. L.-C. I. O. It is, of course, perfectly clear in all these cases that the employers could not refuse to bargain on the ground of change of identity.

The Trial Examiner also cited a number of Board cases.[14] Of these one, *Lenscraft*, appears to be contra to the proposition for which it is cited. In most of the others there was no claim by a second union.[15] Three of the remaining did not involve a refusal to bargain.[16] To the extent that any of these Board cases afford support for the proposition for which they are cited we find them inconsistent with other Board cases, with the cases decided by the courts, and with the accepted principles which we have discussed.

The situation presented in the present case appears to us to be analogous to that with which the Board dealt in *Sears Roebuck and Company, supra*, where the Board said (at pp. 228-229):

> "[The General Counsel] argues, and the Trial Examiner has found, that the present situation is governed by the *Harris-Woodson* case, in that the Retail Clerks 'was the same as, or the successor' to the certified unaffiliated Council, and that the Respondent was therefore obligated to bargain with the former

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[14] *Lenscraft Optical Corp.*, 128 N. L. R. B. 836 (1960); *Alto Plastics Mfg. Corp.*, 119 N. L. R. B. 1458 (1958); *Dalmo Victor Co. Div., Textron, Inc.*, 119 N. L. R. B. 737 (1957); *Dryden Rubber Div., Sheller Mfg. Co.*, 118 N. L. R. B. 369 (1957); *R. C. Williams & Co.*, 107 N. L. R. B. 933 (1954); *Charles Beck Mach. Corp.*, 107 N. L. R. B. 874 (1954); *Prudential Ins. Co.*, 106 N. L. R. B. 237 (1953); *Louisville Ry.*, 90 N. L. R. B. 678 (1950); *Chesapeake & Potomac Tel. Co.*, 89 N. L. R. B. 231 (1950); *Michigan Bell Tel. Co.*, 85 N. L. R. B. 303 (1949).

[15] *Dalmo Victor Co. Div., Textron, Inc., supra*, note 14; *Dryden Rubber Div., Sheller Mfg. Co., supra*, note 14; *Charles Beck Mach. Corp., supra*, note 14; *Chesapeake & Potomac Tel. Co., supra*, note 14; *Michigan Bell Tel. Co., supra*, note 14.

[16] *Alto Plastics Mfg. Corp., supra*, note 14; *Prudential Ins. Co., supra*, note 14; *Louisville Ry., supra*, note 14.

organization. In the *Harris-Woodson* case, the Board found that the respondent employer had unlawfully refused to bargain with an industrial union directly affiliated with the C. I. O., and directed the employer to bargain with that union. Subsequently, the industrial union affiliated with Textile Workers Union of America, C. I. O., as the result of a vote of an overwhelming majority of the employees in the old union. Thereupon, the Textile Workers moved to substitute its name for that of the industrial union in the Board's bargaining order. The Board granted the motion, finding that, for the purposes of the bargaining order, the two organizations were the same in view of the fact that the bulk of the members and all the officers were the same. It is significant that after the change of affiliation, no organization remained which claimed to be the original labor union.

The *Harris-Woodson* doctrine must be limited to the particular facts of that case. It was not intended to be a vehicle for undermining the Board's contract-bar rule or for encouraging raids on an existing bargaining representative during the life of a valid collective-bargaining agreement. In the present case, the certified bargaining representative did not disappear after the disaffiliation action. Some but not all members shifted to the new organization; most but not all officers transferred their allegiance to the Retail Clerks. The certified unaffiliated Council continued to exist and to represent employees at the Fenway as well as at the Cambridge store. The Retail Clerks therefore stands forth not as the *alter ego* of the certified unaffiliated Council, but like any other union which, during the life of a valid bargaining contract, has succeeded in diverting to itself from the recognized bargaining representative the support of a majority of employees in the bargaining unit. As, at the time the Retail Clerks made its request for bargaining, the Respondent's contract with the unaffiliated Council still

had approximately 1 year to run, the demand created no question concerning representation. If, instead of making the demand, the Retail Clerks had filed a representation petition, the Board would have dismissed it. For the same reasons, the Respondent was free to ignore the demand and to continue dealing with the bargaining representative recognized by the outstanding collective-bargaining agreement."

We hold, then, that the Board's conclusion, on which its orders are rested, that Local 335, Independent, is merely the "*alter ego* or continuance" of Local 335, United Marine Division, is not supported by evidence in the record taken as a whole. On the contrary the situation presented appears to be a fairly typical example of the secession of part of the membership to form a new organization. Under these circumstances the employers cannot be required to bargain with the new organization until its majority status has been established.

The Board formerly designated such a situation a "schism" and, in appropriate cases, ordered an election to permit the employees to express a choice between the old and the new organizations.[17] In *Hershey Chocolate Corp., supra*, the Board placed a severe limitation on the schism doctrine by holding that it would not order an election (i.e. would require the employer to continue to deal with the old organization) unless the division in the union constituted a "true schism" which the Board defined as one arising in the context of a basic intraunion conflict at the national level. Since a division at the local level, such as we have in the present case, unconnected with a national split, may well be as destructive of the stability of labor relations in the industry as would be a division consequent upon a basic intraunion conflict, it is possible that the Board has confined its policy of allowing an election to choose new representatives to too narrow an area. It cannot, however, escape these limitations by requiring employers in schism

[17] See articles cited *supra* n. 7 and Board cases cited therein.

situations at the local level to make a choice at their peril between two rival organizations both of which claim representation.

The orders of the Board are denied enforcement and set aside.

KAUFMAN, *Circuit Judge* (dissenting):

I disagree with the majority's conclusion that the charging party in these proceedings was not the bargaining representative with whom petitioners were required to deal at all times in the period under consideration. As the majority points out, the so-called disaffiliation vote was not taken until May 29, 1960. Petitioners, however, refused to deal with the local's business agent before the May 29 vote; and on May 27, they accorded exclusive recognition to a "temporary administrator" whose credentials they conveniently failed to investigate.[1] Nor is there any doubt in my mind that Local 335, Independent, was in fact and in substance a continuation of the Local 335 that entered into the collective bargaining contracts involved in this case. The "Local 335" governed by the "temporary administrator" was clearly nothing more than a "paper local," and petitioners could not possibly entertain any good faith doubt that the deck scow captains belonged to the "Independent." Any doubt they may have had was surely dissipated by a strike which forced them to re-hire employees who had been discharged because they refused to join the "temporary administrator's" paper local. Therefore, the inadequacy of the May 29 disaffiliation vote is immaterial, since at no time was there any local which could enforce the employees' rights under the existing collective agreement but the charging party—by any name. Because of this, and the complete lack of merit which I find in the petitioner's remaining arguments, I would affirm and enforce the order of the Board.

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[1] The Board did not find that the "temporary administrator" had any authority to take over the affairs of the local, and petitioners do not argue on appeal that the purported "trusteeship" was lawful or proper.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 27,544

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS LISTED IN APPENDIX "A",

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 27,550

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC., and ROCKVILLE SCOWS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 27,560

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO,

Respondents.

PETITION FOR REHEARING BY INTERVENOR DECK SCOW CAPTAINS LOCAL 335, INDEPENDENT

HOWARD SCHULMAN, New York, New York, for Intervenor.

Petition for rehearing denied.

20 September 1962.

H. J. F.,
P. R. H.,
I. R. K.,
U. S. C. JJ.

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GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC., and ROCKVILLE SCOWS, INC.,

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CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO,

Respondents.

PETITION FOR REHEARING IN BANC

HOWARD SCHULMAN, New York, N. Y., for intervenor Deck Scow Captains Local 335, Independent.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

1 October, 1962.